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E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 548

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona, *Appellant*,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona, and WESLEY BOLIN, Secretary of State of Arizona, *Appellees*.

On Appeal from the United States District Court for the District of Arizona

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BRIEF FOR APPELLANT

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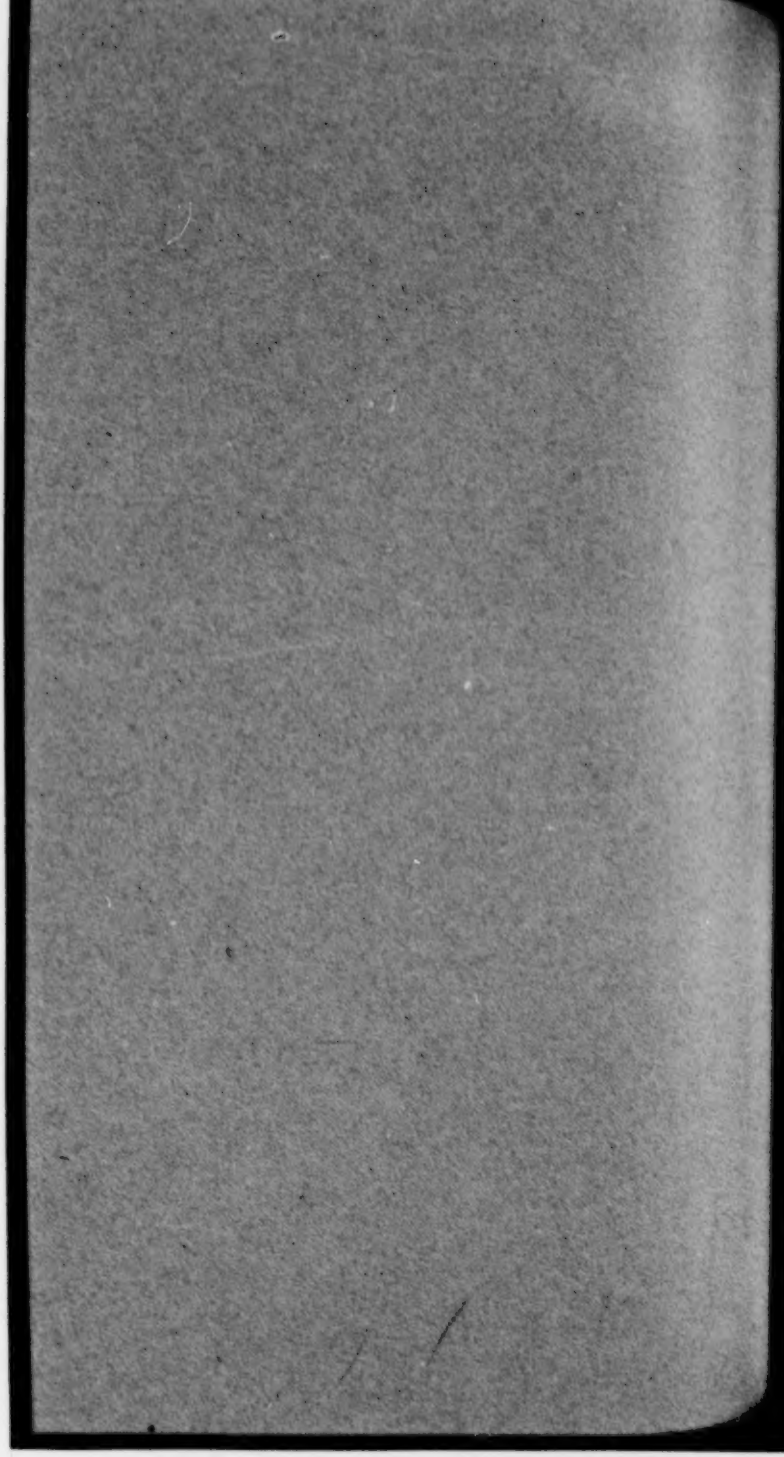

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THE OPINIONS BELOW

The decree of the District Court for the District of Arizona holding that both houses of the Arizona Legislature were unconstitutionally apportioned was filed on February 2, 1966 and appears at 250 F. Supp. 537.

(App. 37, 51) This decree was modified by a First Supplemental Decree filed on March 14, 1966, and a Second Supplemental Decree filed on December 5, 1966, which appear at 254 F. Supp. 997 and 289 F. Supp. 827 respectively. (App. 61, 66) The decree from which this appeal was taken was filed on May 19, 1970, and appears at 313 F. Supp. 148. (App. 111, 114)

JURISDICTION

This is a direct appeal from an interlocutory order dated May 19, 1970, of a three judge court denying an injunction. Jurisdiction is conferred by 28 U.S.C.A. 1253. The notice of appeal was filed on June 18, 1970, which was within the time allowed by 28 U.S.C.A. 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES

Involved in this case is whether the citizens of Arizona are entitled to the protection afforded by Section 1 of the Fourteenth Amendment to the United States Constitution which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also involved in this case is Chapter 1, Twenty-ninth Legislature, State of Arizona, First Special Session, signed into law on January 22, 1970. (App. 87)

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether it was error for the District Court to refuse to enjoin the enforcement of an Arizona legislative redistricting statute which creates districts with grossly unequal numbers of people and which substantially impairs the voting rights of the poor, the urban ethnic minorities, the agricultural farm workers, and the American Indians. The subsidiary question fairly comprised in the foregoing is whether it was error for the District Court to fail to fashion appropriate relief, and to refuse at this time to fashion such relief, by ordering a Constitutionally valid plan to be placed into effect based on population figures and other necessary evidence that has been presented to it.

STATEMENT OF THE CASE

A statement of the procedural background of this case, beginning with filing of the complaint, will be conducive to a proper understanding of the issues. More importantly though, it will illustrate the capacity of the Arizona Legislature for endless delay in fulfilling its obligation to remedy an outrageous impairment of the Constitutional rights of the citizens it serves.

The complaint was filed on April 27, 1964, (App. 1) which was two years after this Court's determination that malapportionment of state legislatures violated the Equal Protection clause, that the federal courts had jurisdiction to fashion relief for such a violation, and that voters such as the plaintiff Klahr had standing to seek relief. *Baker* v. *Carr,* 369 U.S. 186 (1962). At that time the sparsely populated counties were overrepresented in both houses of the Legislature in ac-

cordance with the Constitution of Arizona, Article 4 Part 2, Section 7.

On June 25, 1964, the Court ordered all proceedings to be stayed until after the next regular session of the Legislature and, when nothing was accomplished during that time, postponed the matter again until after a special session which had been ordered by the Governor. (App. 2-3, 3-4) During that session the Legislature came up with Senate Bill 11 which grossly malapportioned the Senate and did not deal with the House. The decree of February 2, 1966, held it to be unconstitutional. (App. 37, 51)

By the decree of February 2, 1966, the Court also undertook to impose its own "temporary and provisional" plan. This plan provided for thirty legislative districts as follows: Maricopa County (including Phoenix) was to be subdivided into fifteen districts on the basis of voter registration; Pima County (including Tucson) was to be divided into six districts on the same basis; and the remaining districts were rural counties or groups of rural counties. As the Court noted in its decree of May 19, 1970, the deviations under this plan were +15.5 per cent to —6.5 per cent in the rural districts. (App. 117) The deviations within the urban counties due to the voter registration rather than population figures was not computed. This plan was used in the general elections of 1966 and 1968.

The second effort of the Legislature to reapportion itself yielded Chapter 1, Twenty-eighth Legislature, First Special Session, enacted in June, 1967. This was subjected to referendum, approved by the voters, and proclaimed into law on January 17, 1969. This was yet another reapportionment on the basis of registered voters rather than people and it provided for deviations of plus or minus 40 per cent until 1971, and plus

or minus 16 per cent thereafter. It was declared unconstitutional by the decree of July 22, 1969. (App. 82)

In its third and last attempt to redistrict the State the Legislature gave us Chapter 1, House Bill 1, Twenty-ninth Legislature, First Special Session, which was signed into law on January 22, 1970. (App. 87) The hearing on the validity of this plan was followed by the decree of May 19, 1970, upon which this appeal is based. A review of the propriety of this decree requires an inquiry not only into what the Court did but what it could have done and should now do to bring Constitutional apportionment to Arizona.

Chapter 1 is the creation of a computer which was operated by Mr. Paul Marston who happens to be the Recorder of Maricopa County, and he explained at the hearing how he arrived at it. (Tr. 62-82) Briefly the computer was told to form thirty districts (one senator and two representatives to be elected from each district) by grouping together political precincts. Since no one knows how many people reside in the precincts the computer was told to assume precinct population to be that part of 1960 county population which the number of registered voters in the precinct in 1968 bears to the number of registered voters in the county in 1968. The computer was instructed to accomplish the following objectives in the following order: (1) to make the districts as equal as possible; (2) to circumscribe the districts in such a way that each includes one incumbent senator and two incumbent representatives; (3) to make the districts compact; and (4) to make districts politically homogeneous.

An alternative plan was presented to the Court by appellant which also provided for thirty districts. In

this plan however the districts were groupings of census enumeration tracts for the reason that the number of people in census tracts (as distinguished from precincts) is known. The population figures used in the plan were 1960 statewide census or 1965 partial census projected to 1968 by the Arizona Employment Security Commission working under the supervision of the United States Census Bureau. (Tr. 164-169) The adoption of this plan would require changes in the precinct boundaries to coincide with precinct boundaries. Or, if time would not have permitted such changes before the next election, the district boundaries could have been changed to coincide with precinct boundaries. (Tr. 229-233)

The Court in its decree of May 19, 1970, agreed with appellant's approach in principle but ordered the use of the Chapter 1 plan for the 1970 general election. Thereafter, the decree holds, the Legislature should be given yet another chance, until November 1, 1971, before the Court will entertain proposals of any party for a plan to be imposed by the Court.

ARGUMENT

It is natural and common to compare this Court's stand against malapportionment, beginning with *Baker* v. *Carr* (*supra*) in 1962, with its stand against public segregation beginning with *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954). Both cases dealt with old and deep problems. And both were to be followed by aggravation caused by those who would not have the will to obey the law of the land. It is in that context, i.e., the years of stubborn refusal to do the right thing, that the malapportionment problem in Arizona should be viewed. No longer need we inquire

into what the law requires. The decree of May 19, 1970, indeed displays a clear understanding of the Court below as to what needs to be done. It is not appropriate now then to define the mandate of *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), and the others. Rather, guidance is to be sought from the mandate of *Watson* v. *City of Memphis,* 373 U.S. 526 (1963).

Watson v. *City of Memphis* dealt with Memphis's stubborn delay in fully desegregating its parks and other public facilities. This Court there noted that *Brown I* had been decided nine years before and that it had been held applicable to public recreational facilities eight years before. This Court then stated:

> "The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason they are promptly to be fulfilled." 373 U.S. 526, 533.

In this case as in *Watson,* any time leeway that may be allowed by the "deliberate speed" doctrine has long since been used up.

The denial of Constitutional rights in this case is particularly obnoxious because of its ugly racial overtones. The people who are sadly underrepresented are not, as perhaps in other cases, rural people or city people or upstate people or downstate people. The victims in Arizona are the poor, the black, the Mexican-Americans, and the American Indians. It is for instance the minority people of South Phoenix who are in a district of 70,000 people, or 24.1 per cent more than the norm; and it is their affluent all-white

neighbors in Northeast Phoenix that are in a district of 27,000 people, or 52.1 per cent less than the norm—a range from top to bottom of 76.2 per cent. (Tr. 176-179) And the huge area of northeastern Arizona which constitutes the Navajo and Hopi Indian Reservations with 70,000 people do not enjoy a district of their own but continue to be dominated by their white neighbors to their south. (Tr. 132-133) In short, the very people whose only instrument for effecting lawful constructive change is the ballotbox have not been helped by "reapportionment" in Arizona. And they never will as long as the Courts keep putting us off until the Legislature acts.

It was a travesty for the Court to permit the defendants to deprive these citizens for at least two more years of political rights which they so greatly need in these times. The Court had a plan before it which would have cured the evil. If the Court did not approve of it in every respect all the data needed for changing it was on hand. To those who would say there was not time before the next election to "tool up" for the change the Court should have answered: "Do it or run at large." They would have done it.

True, the 1970 general election has already been held so that that aspect of the wrong cannot be remedied. But we still do not have reapportionment in Arizona. And there is no reason now to believe that the present malapportioned Legislature is any more prepared than the prior three Legislatures to reapportion some of its members out of jobs. For this reason the stay of proceedings ordered by the decree below to November 1, 1971, substantially prejudices the interests of the citizens who are wronged. When the Legislature does fail to do the right thing appellant again will present

a fair plan, hearings will be scheduled and sometime in 1972 the Court will again find that it is too late to "tool up" for the changes that are required by law.

For these reasons appellant respectfully requests this Court to order the Court below forthwith to hold hearings on reapportionment proposals by any party and to impose upon the State of Arizona any such plan that cures the present inequities and to continue such plan in effect until the Legislature complies with the earlier mandates of this Court. Without this sort of relief the job will never get done.

Respectfully submitted,

HERBERT L. ELY,
Intervenor-Plaintiff